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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 487

UNITED STATES OF AMERICA, PETITIONER

v.

AMERICAN-HAWAIIAN STEAMSHIP CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above cause on August 13, 1951.

OPINIONS BELOW

The District Court for the Southern District of New York wrote two opinions. The first (R. 1580-1634), is reported at 85 F. Supp. 815; the second (R. 1657-1678), at 92 F. Supp. 785. The opinion and the dissenting opinion in the Court of Appeals (R. 1697-1704) are reported at 191 F. 2d 26.

JURISDICTION

The judgment of the Court of Appeals was entered on August 13, 1951 (R. 1704). On November 2, 1951, the time for filing a petition for a writ of certiorari was extended, by order of Mr. Justice Jackson, to December 26, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a suit to recover just compensation for a cargo ship requisitioned during World War II, the court below improperly approved an award which, in violation of Section 902(a) of the Merchant Marine Act of 1936, included enhancement due to the causes which necessitated the taking.[1]

STATUTES INVOLVED

The pertinent provisions of the Merchant Marine Act of 1936, 49 Stat. 1985, as amended, 46 U.S.C. 1101, 1242 are set forth in Appendix A, *infra*, pp. 26-29.

The immediately pertinent portion of Section 902(a), 46 U.S.C. 1242(a), reads as follows:

> Whenever the President shall proclaim that the security of the national defense makes it

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[1] If certiorari is granted, the Government will also urge that the court below erred in (a) affirming an award which fails to give due effect to, and to take proper account of, the Government's restrictive controls on earnings and operations in 1941 and 1942; (b) affirming an award which gives improper weight to reproduction cost and fails to give adequate effect to the vessel's depreciation resulting from age; and (c) holding that the vessel should be valued as of the date of her delivery to the Government rather than the date of her loss.

advisable or during any national emergency declared by proclamation of the President, it shall be lawful for the Commission to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency, to requisition or charter the use of any such property. The termination of any emergency so declared shall be announced by a further proclamation by the President. When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, *but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use.* [Italics supplied].

STATEMENT

This was a libel in admiralty, on a policy of war-risk insurance, to recover just compensation for the loss of a ship. The use of the ship, the S.S. *Alaskan,* owned by respondent, was requisitioned on June 12, 1942, by the War Shipping Administration, as part of the wartime requisition program under which the Administration acquired almost our entire ocean-going cargo fleet within a few weeks, beginning in April, 1942 (R. 1535, 1549). The War Shipping Administration's standard form requisition time charter contained war risk insurance provisions, including an option to the owner, in the event of loss, of having the loss fixed on the basis of "just compensation to be deter-

mined in accordance with Section 902 of the Merchant Marine Act, 1936, as amended." The *Alaskan* was sunk by enemy action on November 28, 1942. Respondent, after applying to the War Shipping Administration for just compensation under the above insurance option and rejecting an offer of $776,003, brought this libel in accordance with Section 902 (R. 1535-1538). The main issue involved was that of valuation.

The *Alaskan* was a dry cargo freighter built by the United States Shipping Board during the first World War and sold to respondent in 1928. She had a capacity of 10,350 deadweight tons, a speed of 12.6 knots, and physical characteristics roughly comparable with most of the standard type of cargo ships operating before the war, and equivalent to the Liberty ships which the War Shipping Administration built in large numbers during World War II (R. 1544, 1546, 1135).

Respondent paid the Government about $289,100 for the vessel in 1928, and it made additions and improvements amounting to somewhat more than $237,000, so that the respondent's total investment was about $526,519 (R. 1543). The parties stipulated that the *Alaskan's* value on September 8, 1939, when the President issued his proclamation of limited national emergency, Proclamation No. 2352, 3 C.F.R. Cum. Supp., p. 114, was not in excess of $450,000 (R. 1496). The vessel was 24 years old when she was sunk.

The admiralty court referred the case to a commissioner, who found the value as of the date of requisition, June 12, 1942, and also as of the date of loss, November 28, 1942, to have been $983,250. With appropriate adjustments for the seventy-five per cent statutory part-payment previously made by the War Shipping Administration and for interest on the balance due, the commissioner allowed this amount (R. 1570). On exceptions duly taken by both parties to the commissioner's report (R. 1572, 1576), the District Court approved the report, except for a change in the amount of interest, here immaterial (R. 1580-1634).[2]

The Government appealed, contending on various grounds that the decree overvalued the ship; among the errors assigned was the failure of the commissioner and the District Court to apply the enhancement clause of Section 902(a) of the Merchant Marine Act (R. 1641-1643). While that appeal was pending, this Court announced its decision in *United States* v. *Cors*, 337 U.S. 325 (June 13, 1949), for the first time interpreting the enhancement clause and applying it to judicial determinations of just compensation. Thereupon, the Government filed a motion in the Court of Appeals, ask-

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[2] The commissioner's report was dated July 14, 1948 (R. 1570). The Government's exceptions were filed on October 1, 1948 (R. 1571-1573), and the libelant's on October 5, 1948 (R. 1576-1579). The District Court's main opinion was rendered on January 21, 1949 (R. 1625), and its supplemental opinion on February 15, 1949 (R. 1634). The decree was entered on March 4, 1949 (R. 1635-1636).

ing remand of the case to permit the Government to introduce further evidence showing, in consonance with the *Cors* decision, the extent to which the value of the *Alaskan* had been enhanced by the Government's wartime need for ships (R. 1648).[3]

This motion the Court of Appeals denied in January 1950, with leave instead to the District Court to hear it (R. 1655); on the same day, a like motion was filed in the District Court (R. 1659). Leibell, J., who had also been the judge at the hearing on the merits, denied the motion. He placed his decision on three major grounds: (1) that the *Cors* case did not really represent a supervening change in the law, (2) that it had been open to the Government, from the beginning, to present its evidence of the effect on the *Alaskan's* value of the Government's need for shipping, so that it was within the Court's discretion to refuse to hear further evidence, and (3) that the proffered evidence was irrelevant to the issue of enhancement, properly interpreted. (R. 1657-1678).

With the permission of the Court of Appeals, the Government then amended its appeal from the original decree to include an appeal from the denial of this motion to take further evidence of enhancement (R. 1679-1688). On the consolidated appeal, the court below, by a 2-1 decision, affirmed the decree and the denial of the motion, relying

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[3] The evidence which the Government proffered is summarized *infra*, pp. 12-15.

substantially on the District Court's opinions (R. 1697-1699). Judge Clark filed a dissenting opinion, which encompasses the essence of the Government's position (R. 1700-1704).[4]

REASONS FOR GRANTING THE WRIT

In an important decision which the dissenting judge has rightly called "a precedent dangerous in its far-reaching implications" (R. 1704), the Court of Appeals has given the narrowest of readings to the "enhancement" clause of Section 902 of the Merchant Marine Act, as well as to this Court's significant decision in *United States* v. *Cors*, 337 U.S. 325. Despite the fact that the value of $983,250, which the court found for the *Alaskan* as of June and November 1942, was more than double its value in September 1939, none of this large and rapid enhancement during the defense period was attributed to "the causes necessitating the taking or use"; in addition, the Government was denied the opportunity to make a further showing, after the meaning of the "enhancement" clause had been made clearer in *Cors*, of how much of the increase represented prohibited enhancement. The case is important both for its effect on the considerable number of cases still pending, which involve determinations of just compensation for ships requisitioned during World

[4] Judge Clark had been a member (along with Judge Joseph C. Hutcheson, Jr., and Justice Irwin Untermeyer) of the Second Advisory Board on Just Compensation.

War II,[5] and for its impact in the present or any future emergency calling for a new requisition of merchant shipping.[6] The Court of Appeals' ruling frustrates, we believe, the attempt to breathe vitality into Congress' command, expressed in the enhancement clause, to eliminate unconscionable wartime increases in shipping values.

1. In the *Cors* case this Court went far toward settling the question of what are the "causes necessitating the taking", enhancement from which must be excluded in valuing requisitioned merchant vessels for just compensation purposes. It is clear that enhancement stemming from any of three sources is excludable. Analysis suggests the three may often be mutually interdependent in an economic sense, but they may be considered one at a time. The three are these:

First, *a prospective taking of the vessel in ques-*

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[5] At the present time, there are pending in the courts just compensation suits involving the following numbers of requisitioned ships and the following amounts of money:—(1). Ships requisitioned for title: 48 ships classified by the Maritime Administration as large vessels. The value claimed by the owners aggregated $37,207,134.95. The War Shipping Administration's valuation aggregated $14,173,866.76. The unpaid balances involved in litigation amount to $27,354,-145.97. (2). Ships requisitioned for use: 41 large vessels for which pending unpaid claims aggregate $32,074,487.42. These 89 ships involve 74 separate suits, in the district courts or the Court of Claims.

[6] The emergency power to requisition ships in World War II was ended July 25, 1947. 61 Stat. 451, 454. The President's Proclamation of December 16, 1950 (Proclamation 2914, 15 Fed. Reg. 9029) "proclaiming the existence of a national emergency" has revived the power to requisition under Section 902(s) of the Merchant Marine Act (*infra*, p. 26).

tion, reasonably probable (337 U.S. at 334, 335). As we read the decision, this much is assimilable to the pre-*Cors* eminent domain rule of *United States* v. *Miller,* 317 U.S. 369, 374-379. The prospect of a special need by the Government leading to a probable taking gives rise to a speculative increase in the value of land or in the value of each member of a class of similar ships—in this case, ocean-going dry-cargo carriers of the *Alaskan's* type.

Second, *the previous taking of similar vessels* (337 U.S. at 334, 335). To the extent that previous requisitions of tonnage reduce the space available to meet the demand of private shippers, the value of the ships remaining in the market is enhanced. The dissenters in *Cors* questioned whether this element of enhancement was barred by the enhancement clause, the objection being that the increase from this source was due to private demand and not to the Government's need which necessitated the taking. 337 U.S. at 343. But the Court concluded that this item was excludable.[7]

Third, *the Government's intervention in the shipping market by purchase, voluntary charter, and all other means short of direct requisition* (337 U.S. at 334, 335, 336). It is this element on which the Government mainly relies. This Court spoke

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[7] We treat enhancement due to the removal of vessels from the private market by government charter or purchase, rather than by requisition, as part of the third category of excluded enhancement.

of the "Government's need for vessels," which it defined as a "need for the precise ship taken, for the type or class of ship taken, or for ships which perform the same or related functions." 337 U.S. at 334. It is clear that after September 1939 this defense and war need was sought to be satisfied in ways other than the actual requisition of ships: —through charters, purchases, and the use of cargo space on private carriers. That the Court did not equate the Government's intervention in the market with use of the requisitioning power alone is clear from the opinion which carefully distinguishes the Government's need from its actual takings. 337 U.S. at 334-6. Moreover, although the first requisitions did not occur until July 1941,[8] and requisitioning did not begin on a large scale until April 1942 (R. 1199-1201), the Court expressly held that enhancement occurring before May 1941 was excludable from the determination of just compensation. 337 U.S. at 334.

In short, the *Cors* case, as we read it, requires the exclusion of all enhancement in a ship's value attributable to the Government's defense and wartime need for tonnage and its consequent intervention in the shipping market, whether through compulsory requisition or through voluntary purchase, chartering, or hiring of vessel space. A sharp increase in the value of ships remaining in

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[8] All of the requisitions in July 1941 were of laid-up foreign tonnage.

private hands follows close upon such broad-scale public intervention because of the prospect that the remaining vessels will be used in the Government's expanding defense and war program, combined with the fact that the supply of vessels is limited and the total demand great and increasing. The direct result is the creation of a sellers' market in which normal prices are highly inflated because of the Government's special need (337 U.S. at 333-334)—inflated values which the Government need not pay as part of constitutional "just compensation."

This construction of the "enhancement" clause accords fully with the clause's long legislative history which shows that its prime purpose was to require vessels to be requisitioned at less than their war or emergency prices, such as were paid during World War I. Congress intended that requisition awards should follow the levels of peacetime prices, of the "value prior to the emergency", of "normal values", of values before the "war comes on".[9] Such emergency, abnormal, and wartime market prices largely result from the Government's special and extraordinary demand for ships and shipping space in time of stress, and the "enhance-

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[9] This legislative history is set out and discussed at length in the Government's brief in *United States* v. *Cors*, No. 132, October Term, 1948, pp. 25-40, and 92-105, to which the Court is respectfully referred. The same history is referred to by Judge Clark below as wholly "one way" in its approach (R. 1700).

ment" clause was designed as the device to contain this inflation in values.

2. If this type of enhancement due to the "Government's need for vessels" must be excluded, it is undeniable that the 110% increase in the *Alaskan's* 1942 value (as found below), over its September 1939 value, contains a very substantial measure of prohibited inflation which the courts below made no effort to excise.

a. It is known to everyone that long before we entered World War II the Government's defense and allied-aid program was making large and increasing use of ocean shipping, and it is obvious that ship values responded to this pressure. At the outbreak of the war in Europe, in September 1939, the shipping market was depressed; tonnage existed in excess of demand. After the fall of France in June 1940, the American defense program, which had been begun a year earlier, increased its tempo tremendously and at an accelerating rate. The newly acquired foreign bases had to be built and supplied. Immense quantities of strategic and critical materials, including rubber, tin, manganese, and chromium, were imported for Government account or to fill Government defense contracts. In early 1941, lend-lease began, and the President called for a pool of 2,000,000 tons of existing shipping to move arms to the Allies. The upward movement in the use of the nation's merchant shipping facilities for Government purposes con-

tinued throughout 1941, and, of course, on into 1942.

These wholesale Government shipping activities may be numerically summarized as follows: [10] (i) in 1939, American private shipping interests owned 681 large cargo ships, aggregating about 5,000,000 tons. Between September 1, 1939, and December 31, 1941, private persons acquired 68 new ships, all built by the Maritime Commission, aggregating 700,000 tons, for a total of 749 ships and 5,700,000 tons. In the same period of time, from this fleet of 749 ships, no less than 321, or 43%, were diverted to complete Government use for defense purposes, through purchase and charter alone.[11] (ii) The Government's defense and allied-aid program hired so much shipping space as to account for 100% of the increase of exports, and 70% of the increase of imports, carried by privately owned and operated United States flag ships in 1941 over 1939.

b. At the same time, the ship market naturally responded with a "spiraling of prices" (337 U. S. at 333). Values, which had averaged roughly $15 to $20 a ton in 1939, reached $50 a ton in December

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[10] Evidence supporting these and other precise factual conclusions, as well as the economic correlations to be drawn from them, was proffered to the courts below on the motions for further findings. *Supra*, p. 6.

[11] At the same time, of course, a gigantic building program was undertaken, idle foreign ships were requisitioned, and obsolete laid up ships were released for use. But these sources of tonnage, except for the 68 new ships released to private hands, remained in the Government's hands to meet needs in addition to those which caused it to intervene so heavily in the private market.

1940, and $100 a ton in July 1941. This was the peak. On July 14, 1941, the Ship Warrants Act (55 Stat. 591) was passed. This Act permitted the Maritime Commission to fix private charter rates, by the device of issuing warrants which were required as a condition to obtaining priorities in the use of port facilities—loading, towage, docking, fuel, repair services and the like. Thereafter, the Maritime Commission was able to impose ceilings on charter rates and to force them down to these ceilings, with some consequent decrease in theoretical market value. The general requisition (in April 1942) did not take place until this partial reduction had been accomplished, so that requisition prices should presumably not reflect all of the exorbitant increase in rates, even if the "enhancement" clause be disregarded. See R. 1195-1202. But 1942 values remained far closer to the 1941 maximum than to 1939 or even 1940 levels.[12] If one thing is clear, it is that a large part, if not all, of the skyrocketing of the value of cargo ships in the period from 1939 to 1942 must have been directly due to the Government's use of ocean shipping for defense and allied-aid, *i.e.*, to the Government's defense and war need for vessels.[13]

3. There is also no doubt that the courts below

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[12] The award below amounts to $95 per ton in 1942 (R. 1582, 1701).

[13] Expert economic testimony is available, and was proffered below on the motion for further findings, that at least 80 per cent of the increase in values between 1939 and 1941 was attributable to the government's defense need for shipping.

did not at any time consider this type of prohibited enhancement or seek to measure and exclude it.

a. The commissioner squarely based his award on 1941 values (R. 1562-1563; 1589-1590, 1622-1623), which, as we have just shown, were necessarily inflated by the Government's shipping activities. As a first "check" on this basic figure, he used "reproduction cost". This could not afford a valid check, since all the shipbuilding facilities of the country were preempted by the Government and were unavailable to private persons. Moreover, reproduction cost, at all normal times, has generally exceeded the value of dry-cargo ships to American flag operators, as shown by the fact that the Government has been obliged to build ships and sell them at reduced prices or with a construction subsidy calculated to equate the sales price to foreign costs. See Merchant Marine Act, 1936, as amended, 49 Stat. 1985, Title V, VI, and VII; Merchant Ship Sales Act, 1946, as amended, 60 Stat. 41, 50 U.S.C. App., Supps. I-IV, 1735*ff*. As his second "check" on his award, the commissioner resorted to earnings, but earnings obviously reflect the Government's intervention in the free market.

The commissioner's passing and cryptic references to the "enhancement" clause (R. 1542, 1562) mean either that in his view (i) the clause prohibited only those value-increases accruing after we entered the war on December 7, 1941, or (ii) the

clause merely directed that account be taken of the *depressive* effect on ship prices of the governmental controls which followed upon the Ship Warrants Act (*supra*, p. 14); or (iii) on the contrary, the clause required him to disregard these controls and add to the respondent's just compensation the amount by which the controls had driven the *Alaskan's* actual 1942 value down from the 1941 peak.[14] Whichever of these divergent and erroneous views the commissioner had,[15] it is plain that he never considered that the "enhancement" clause had anything to do with the increase in values which accrued from 1939 through 1941, and that he did not attempt to eliminate any enhancement, included in the 1941 values, which could be traced to the Government's need.

b. The District Court's original opinions (R. 1580-1634), which likewise made slight mention of prohibited enhancement (R. 1597-1598), also show that it took no account whatever of *increases* in value occurring prior to 1942. The court's major concern was with justifying its consideration of the alleged *depressive* effects of governmental price and other controls in 1942, which the libelant contended should be disregarded (see R. 1591-1615,

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[14] The dissenting judge below seems to have taken this third view of the commissioner's reading of the clause. See R. 1701, 1702, 1703.

[15] The *Cors* case expressly rejects the first (337 U.S. at 334), and implicitly refutes the second and third. The third is also contrary to *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, and *United States* v. *Felin & Co.*, 334 U.S. 624.

1622-1623, 1626-1634). And in its opinion on the motion for further findings (R. 1657-1678), the court rejected, as a matter of law, the Government's view of the types of enhancement excluded by the statute. It flatly held that evidence of "the extent of the Government's activities in the market from September 1939 on, as a shipper or berth or space charterer" [similar to that summarized above at pp. 12-13] was "of doubtful relevancy and would have no probative value on the issue" of enhancement (R. 1675), and would not change the result of the original proceeding (R. 1676). In its view, the clause covered only the first two of the three categories outlined above at pp. 8-10.

c. Similarly, the Court of Appeals, in affirming on the District Court's opinions (R. 1699), necessarily construed the enhancement clause as unconcerned with value-increases attributable to the Government's intervention in the shipping market by purchase, charter, space-hiring, and other means short of direct requisition (*supra*, pp. 9-10). As the dissent points out, the court below commits the fundamental substantive error of ignoring the purpose of the clause which was to exclude such increases in ship values as were due to the Government's defense shipping activities in 1939-1941 (R. 1701, 1703-1704).

d. Thus, entirely apart from the new evidence which the Government sought to introduce after judgment, the $983,250 award cannot stand because

it is plainly based on an improper and unduly narrow view of the enhancement which is prohibited by Section 902 of the Merchant Marine Act. From judicial notice and evidence in the original record (see R. 1606-1613, 1616-1618 1632, 1666*ff*), the trial court knew enough about the public intervention in the ocean shipping market to require it to seek to measure the enhancement in the *Alaskan's* value due to those activities.[16] See *United States* v. *Cors*, 337 U.S. at 335-336. In this inquiry, the burden would be on the libelant both to negate the existence of a general increase in value for this cause and to show that the *Alaskan* did not participate in any such general increase.[17] But no such in-

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[16] In its opinion on the motion for further findings, the District Court appears to have thought that certain statements of Admiral Land to a Congressional committee constituted admissions on the Government's part that there was no "enhancement" included in 1941 values (see R. 1666, *et seq.*, esp. 1669, 1674). Aside from the propriety of using such statements and similar material submitted to legislative bodies for legislative purposes as binding on the Government in later litigation, we may note that, at the time the statements were made, Admiral Land and the War Shipping Administration —whose view of prohibited enhancement was, in any case, much too limited—expressly recognized that their awards included at least some of the prohibited factor, an inclusion based on the fear that the enhancement clause might be held unconstitutional and that the courts would grant excessive judgments (R. 1701-2). See also *infra*, pp. 20*ff*.

[17] Cf. *Marion & Rye Valley Ry. Co.* v. *United States*, 270 U.S. 280, 285; *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 273; *United States* v. *Felin & Co.*, 334 U.S. 624, 631, 641-642; *United States* v. *Toronto, H. & B. Nav. Co.*, 338 U.S. 396, 406; *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 128.

Nothing in the record suggests that the *Alaskan* differed substantially from other dry-cargo ocean vessels. The entire ocean merchant fleet was substantially fungible for shipping

quiry was made, and the trial court did not even go as far as the Court of Claims which posed the question in the *Cors* case and found some enhancement but failed to measure it properly. The award is therefore tainted with a fundamental error of law requiring reversal and further hearings. Cf. *Helvering* v. *Taylor,* 293 U.S. 507.

4. The courts below also erred in refusing to permit additional evidence to be introduced by the Government—although the burden was not its—so that proper and discriminating findings could be made as to the scope and amount of excluded enhancement. This refusal was justified on the ground that the evidence was proffered by the Government under the theory that there was a supervening change in the law after the appeal, whereas the *Cors* decision did not really change the existing law. But a realistic appraisal of the controversial history of the enhancement clause since 1942[18] shows that the *Cors* case at least constituted a definite clarification in a field in which great doubt and dispute had theretofore existed.

a. In November 1942, the Comptroller General took the position that the cause necessitating the taking was the wartime emergency; that this emergency dated from the President's proclamation of

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purposes, and the ships reacted in price in the same way during the 1939-1941 period. When requisition came in the Spring of 1942, it came for almost the entire industry at once.

[18] This history is set forth in detail in the Government's brief in the *Cors* case, October Term, 1948, No. 132, at pp. 90-113.

a limited national emergency on September 8, 1939; and that, as a result, the amount by which a given ship increased in value between September 8, 1939, and the time of its requisition constituted the measure of excludable enhancement. 22 Comp. Gen. 497; 22 Comp. Gen. 608. The Comptroller General subsequently made clear that he did not regard as forbidden enhancement so much of the rise as could be attributed to a rise in the general price level, due to improved economic conditions. Thus, he added to a ship's 1939 value an amount proportional to the rise in the price index for shipbuilding at the time of valuation—usually from 30% to 33% during 1942.

The War Shipping Administration at first opposed this view, taking the position that the causes necessitating the taking did not come into being at least until the proclamation of a full national emergency, on May 27, 1941.[19] Further, the Administration believed that ship values had reached a maximum at about this time and that, thereafter, because of its efforts to bring about reductions in charter rates, values declined. See Hearings before the House Committee on Merchant Marine and Fisheries on H. R. 2731, 78th Cong., 1st sess. (June 10, 1943), pp. 5-8. It would follow from this

[19] The documents comprising the early steps in the controversy between the Comptroller General and WSA, many of which are in the form of letters, are set forth in Doc. 20 ("Compilation of Material on the Determination and Payment of Just Compensation for Vessels Requisitioned Under Section 902 of the Merchant Marine Act, 1936"), printed by the House of Representatives' Committee on Merchant Marine and Fisheries, 78th and 79th Congs.

position that values after May 27, 1941, included no prohibited enhancement whatever.

As a result of the Comptroller General's ruling, the War Shipping Administration, in December 1942, suspended payments under Section 902, except in hardship cases. This led to action by both Congress and the President. A clarifying bill (H. R. 2731, 78th Cong., 1st sess., see R. 1190, 1206) was introduced in Congress, and hearings were held. While the bill was being considered, on October 15, 1943, the President appointed the Advisory Board on Just Compensation, consisting of Circuit Judges Learned Hand, Hutcheson, and Parker, to devise rules and standards for measuring just compensation. Executive Order 9387, 3 C. F. R. 1943 Supp., p. 48. Thereupon the proposed legislation was dropped. 89 Cong. Rec. A4957-A4959.

The Advisory Board, after hearings, devised a set of rules which the War Shipping Administration adopted. Appendix B, *infra*, pp. 29-35. These rules contain a third approach to the problem, alternative to that taken by the Comptroller General and differing from that implied by the prior views of the War Shipping Administration; and it was these rules that this Court followed in *Cors*, 337 U.S. at 334. The Advisory Board agreed that ocean ship values reached a maximum in the middle of 1941, and thereafter declined somewhat. But it also found that the causes necessitating requi-

sition arose before May 27, 1941, and continued thereafter. It recognized that enhancement due to the causes necessitating the taking had not been eliminated, and established the three categories of prohibited enhancement which the Court adopted and amplified. See Rule 4, Appendix B, *infra*, pp. 32-33, and 337 U.S. at 330-331, 334-336.[20] The approach laid down by this Court and the Advisory Board was to find the value at the time of taking and deduct from it so much as was due to the enumerated causes. The Comptroller General's approach had been to find the 1939 value and adjust it for the increase in the general price level. Theoretically, as the Advisory Board recognized (see pp. 30-31, *infra*), the two methods could reach very similar results.[21]

Controversy continued even after the promulgation of the Advisory Board's rules, and was expanded to include disputes over the interpretation and application of those rules. Congress took

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[20] A second Advisory Board on Just Compensation was appointed in 1945 and reported on October 26, 1945. See fn. 4, *supra*, p. 7. The second board issued eight supplementary rules.

[21] It does seem very likely that the method of *Cors* and the Advisory Board should give results, for ocean vessels, close to those given by the Comptroller General's method of finding 1939 value and adding to it the increase due to general improvement in economic conditions. The difference between the total increase over 1939 values and the increase due to general economic conditions would probably measure the increase due to the Government's need. Since the Government's intervention did not become really large until mid-1940, and since values at that period were relatively near 1939 levels, the difference between the Comptroller General's method and the indicated method would probably not be great.

action which was intended, first, as confirming WSA's administration of the Board's rules and, later, as confirming the Comptroller General's more stringent views.[22] Even within the executive branch there was considerable dispute as to the application and meaning of the enhancement clause and the board's rules, especially in judicial determinations of just compensation.

b. In these circumstances, it seems plain, as Judge Clark said, that not until the *Cors* decision in June 1949, did the "enhancement" clause "have clear support and chance of operation within the Government or without" (R. 1701), and that the decision "marks a turning point and requires a new orientation in this case" (R. 1702).

It is true that in *Cors* the Court said that on the facts of that case the statutory standard was coterminous with the judicial standard. 337 U. S. at 332. The Government's interpretation of the clause had been attacked as an unconstitutional

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[22] Contrast the National War Agencies Appropriations Act, 1946 (Act of July 17, 1945), 59 Stat. 473, 480, and the Naval Appropriation Act, 1947 (Act of July 8, 1946), 60 Stat. 481, 499-500, 501, with the Second Supplemental Appropriation Act, 1948 (Act of July 31, 1947), 61 Stat. 695, 697-698. On the significance of these statutes, see the Government's brief in *Cors*, Oct. Term, 1948, No. 132, at pp. 103-105.

Congress has recently announced, once again, that it favors the Comptroller General's view of prohibited enhancement. The Third Supplemental Appropriation Act, 1951, P. L. No. 45, 82d Cong., 1st sess., June 2, 1951, provided that no money should be paid by the Department of Commerce for requisitioned vessels unless the price "is computed in accordance with subsection 902(a) [of the Merchant Marine] Act, as that subsection is interpreted by the General Accounting Office."

interference by Congress with the judicial function of measuring just compensation. The Court held it unnecessary to determine the issue, because the clause, as there applied, was merely an extension of the judicial principle that just compensation and market value are not always the same. The Court referred to *United States* v. *Miller,* 317 U. S. 369, excluding value due to the probability of condemnation, and to *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 76, excluding value due to the taker's special need, as examples of this constitutional principle.

It does not follow, however, that because of this statement of the broad constitutional principle involved, the decision was old in its application to ships requisitioned in a war or emergency period. The Court clearly went beyond the particular example of *United States* v. *Miller, supra,* in defining the Government's need which necessitated the taking; the *Miller* rule is direct precedent for only one of the three aspects of the "causes necessitating the taking (*supra,* pp. 8-9). In the field of enhancement in ship values, the *Cors* opinion clearly changed "the legal atmosphere" and constituted a "modification or growth in legal principles" which effected "a significant change in the situation." Cf. *Commissioner* v. *Sunnen,* 333 U. S. 591, 600.

The courts below should have been responsive to that change. Their failure to respond means that an ocean-going cargo ship worth $450,000 in Sep-

tember 1939, has been priced at $983,250 in June 1942, without any real effort to ascertain how much of this doubling in value resulted from the Government's defense and war need which ultimately brought about the vessel's taking.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

DECEMBER 1951.

APPENDIX A

The pertinent provisions of the Merchant Marine Act, 1936, 49 Stat. 1985, as amended, 46 U.S.C. 1242, are as follows:

SEC. 902. (a) Whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President, it shall be lawful for the Commission to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency, to requisition or charter the use of any such property. The termination of any emergency so declared shall be announced by a further proclamation by the President. When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use. If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, such property shall be restored to the owner in a condition at least as good as when taken, less ordinary wear and tear, or the owner shall be paid an amount for reconditioning sufficient to place the property in such condition. The owner shall not be paid for any consequential damages arising from a taking or use of property under authority of this section.

(b) When any vessel is taken or used under authority of this section, upon which vessel a construction-differential subsidy has been allowed and paid, the value of the vessel at the time of its taking shall be determined as provided in section 802 of this Act, and in determining the value of any vessel taken or used, on which a construction-differential subsidy has not been paid, the value of any national defense features previously paid for by the United States shall be excluded.

(c) If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, the Commission, at the time of the taking or as soon thereafter as the exigencies of the situation may permit, shall transmit to the person entitled to the possession of such property a charter setting forth the terms which, in the Commission's judgment, should govern the relations between the United States and such person and a statement of the rate of hire which, in the Commission's judgment, will be just compensation for the use of such property and for the services required under the terms of such charter. If such person does not execute and deliver such charter and accept such rate of hire, the Commission shall pay to such person on account of just compensation a sum equal to 75 per centum of such rate of hire as the same may from time to time be due under the terms of the charter so tendered, and such person shall be entitled to sue the United States to recover such further sum as added to such 75 per centum will make up such

amount as will be just compensation for the use of the property and for the services required in connection with such use. In the event of loss or damages to such property, due to operation of a risk assumed by the United States under the terms of a charter prescribed in this subsection, but no valuation of such vessel or other property or mode of compensation has been agreed to, the United States shall pay just compensation for such loss or damage, to the extent the person entitled thereto is not reimbursed therefor through policies of insurance against such loss or damage.

(d) In all cases, the just compensation authorized by this section shall be determined and paid by the Commission as soon as practicable, but if the amount of just compensation determined by the Commission is unsatisfactory to the person entitled thereto, such person shall be paid 75 per centum of the amount so determined and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section 24, paragraph 20, and section 145 of the Judicial Code (U.S.C., 1934 edition, title 28, secs. 41, 250).

* * * * *

(e) The Commission is authorized to repair, recondition, reconstruct, and operate, or charter for operation, any property acquired under authority of this section. The Commission is further authorized to transfer the possession or control of any such property to any depart-

ment or agency of the Government of the United States upon such terms and conditions as may be approved by the President. In case of any such transfer the department or agency to which the transfer is made shall promptly reimburse the Commission for its expenditures on account of just compensation, purchase price, repairs, reconditioning, reconstruction or charter hire for the property transferred. Such reimbursements shall be deposited in the construction fund established by section 206 of this Act.

APPENDIX B

The letter of transmittal and the report of the first Advisory Board on Just Compensation to the War Shipping Administration read as follows:

ADVISORY BOARD ON JUST COMPENSATION,
WASHINGTON. D. C., DECEMBER 7, 1943

DEAR ADMIRAL LAND: We are herewith enclosing our report as the Advisory Board on Just Compensation. In it we have set forth in the form of rules the standards and principles to be observed, in respect of the valuation of vessels requisitioned for title or use by the United States, and in the disposition of matters which have arisen and will arise in connection with the granting of insurance upon and the voluntary chartering of vessels.

In arriving at the conclusions the rules embody we have been greatly aided by the material contained in Document 20, in the hearings before the Bland committee, and by the arguments and briefs filed at the public hearing held on November 26 and 27. Because of the

full and exhaustive character of these aids to our deliberations, our labors have been greatly lightened, the time required for them has been shortened, and our confidence in the correctness of the rules we have embodied in our report as our best judgment in the premises has been greatly enhanced.

It seems appropriate to comment briefly on the Comptroller General's ruling of November 28, 1942. Contrary to the impression existing in many quarters, the Comptroller General does not limit compensation in the case of requisitioned vessels to values existing on September 8, 1939. That date is used merely as the starting point for the determination of values. The necessity of allowing subsequent enhancement that is not directly caused by economic conditions resulting from the emergency is specifically recognized by him. This standard does not necessarily exclude subsequent enhancement which directly reflects the economic changes incident to the improvement in general conditions since 1939.

It is obviously impossible to know without very extensive inquiry into the facts to what extent any enhancement in value was due to that cause, and the order which created the Board confined its duties to the establishing of "standards, rules, and formulae." On this account we did not undertake to consider how far the rules we are submitting would in practice reach different results from the rules recommended by the Comptroller General. It is conceivable that in application the difference might turn out to be far less than has at times

been assumed, and that the dispute would appear to be more in the reasoning by which the problems were solved than in the answers reached.

We have been greatly impressed not only with the care and consideration which the record discloses that both you and the Comptroller General have given to the matters involved, but with the moderation and judgment exercised by all concerned in endeavoring to work out a solution consistent with the interest of the United States and the justice of the case. In closing we take this opportunity to record our great appreciation of the fact that this has been so.

Respectfully,

(Signed) LEARNED HAND.
(Signed) JOHN J. PARKER.
(Signed) JOSEPH C. HUTCHESON, JR.

Admiral EMORY S. LAND,
War Shipping Administration,
Washington, D. C.

REPORT OF THE ADVISORY BOARD ON JUST COMPENSATION TO THE WAR SHIPPING ADMINISTRATION

Pursuant to the order of the President of October 15, 1943, establishing it, the Board hereby "in accordance with the applicable provisions of the Constitution and the laws of the United States", establishes "fair and equitable standards, rules, and formulae of general applicability for the guidance of the War Shipping Administration in determining

the just compensation to be paid for all vessels requisitioned, purchased, chartered, or insured by the Administration."

Rule 1.—Just compensation for vessels requisitioned for title or for use is to be determined on the basis of value as of the date of taking, subject to deduction on account of enhancement, if any, as hereinafter set out in rule 4, and with allowance for any loss on account of delay in payment from the date of taking, not exceeding the current commercial rate of interest. Value means value on the American market, not on foreign markets.

Rule 2.—In the case of requisition of foreign-flag vessels under Public Law 101, just compensation should be determined as in the case of domestic vessels.

Rule 3.—Where market value cannot be determined by sufficient sales, or hirings of vessels of like character, made at or about the time of taking, it is to be determined by the Administrator from a consideration of cost of construction, acqusition cost so far as relevant, improvements, replacement costs, depreciation, earnings, physical condition, appraisals for insurance or other purposes, and any other relevant facts upon which a reasonable judgment as to value can be based. These various matters are to be given such weight by the Administrator, as in his opinion they are justly entitled to, in determining the price that would probably result from fair negotiations between an owner willing to sell and a purchaser desiring to buy.

Rule 4.—From the value at the time of tak-

ing, there should be deducted any enhancement due, to the Government's need of vessels which has necessitated the taking, to the previous taking of vessels of similar type, or to a prospective taking, reasonably probable, whether such need, taking, or prospect, occurred before or after the declaration of the national emergency of May 27, 1941. Enhancement due to a general rise in prices or earnings, whenever occurring, should not be deducted. In the application of this rule neither the proclamation of limited emergency of September 8, 1939, nor the facts existing at that time, are in themselves of significance. The Board does not determine whether any enhancement after May 27, 1941, other than as enumerated above as deductible, should be excluded; since the Board is advised that the value of ocean-going vessels was higher on May 27, 1941, than at the time of taking, and that any enhancement since May 27, 1941, in vessels of other types, not deductible under the foregoing, is attributable to a general rise in prices or earnings, and should therefore not be deducted.

Rule 5.—The enhancement clause of section 902 (a) of the Merchant Marine Act of 1936, has no application to the valuation of chartered vessels for the purpose of insurance.

Rule 6.—The enhancement clause of section 902 (a) has no application to voluntary charters or purchases under Public Law 101.

Rule 7.—In the event of loss due to a risk assumed by the United States in connection with the use of any vessel where no valuation or

other mode of compensation has been agreed to, just compensation should be determined on the basis of value on the date of such loss. Where a redetermination or readjustment of rates or values is effected pursuant to the terms of a charter or other agreement, just compensation should be determined as of the date of redetermination. In both cases the determination is subject to deduction on account of enhancement, if any, as hereinabove set out in rule 4.

Rule 8.—Section 902 (b) of the Merchant Marine Act of 1936 has no application to vessels merely because they have received mail subsidies under the act of 1928. The section has application only to vessels which have received a construction-differential subsidy under title V of the Merchant Marine Act of 1936; and a mail subsidy is not a construction-differential subsidy within the meaning of section 902 (b) of the act.

Rule 9.—Valuations agreed upon by the Administrator and owners are binding, if not in excess of just compensation determined as above prescribed; and settlements should be made on the basis of such valuations with an allowance for any actual loss due to the delay in payment from the date when such settlements would have been made, if no objections had been raised, not exceeding the current commercial rate of interest.

Rule 10.—Agreements fixing compensation for the title or use of vessels are not binding in the valuation of vessels of owners not parties to the agreements. Such valuations, however, if freely arrived at, may be considered along with other factors as some evidence of value.

LEARNED HAND.
JOHN J. PARKER.
JOSEPH C. HUTCHESON, JR.

DECEMBER 7, 1943.

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